H. B. Zachry Company *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. Cases 12–CA–14962, 12–CA–14962–2, and 12–CA–15018

December 15, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On September 30, 1993, Administrative Law Judge Philip P. McLeod issued the attached decision. The General Counsel, the Respondent, and the Charging Party each filed exceptions and a supporting brief. The Respondent filed an answering brief to the General Counsel's and the Charging Party's exceptions. The Charging Party filed an opposition brief to the Respondent's exceptions. The General Counsel filed an answering brief to the Charging Party's exceptions. The Respondent filed a reply brief in response to the Charging Party's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] except as modified below, and to adopt the recommended Order as modified and set forth in full below.

1. The judge found that the Respondent violated Section 8(a)(1) and (3) by terminating employee Scott French on April 20, 1992,[4] issuing two disciplinary reprimands to employee Russell Myers on June 1 and 15, refusing to recall Myers from his layoff since August 10, and disqualifying 18 job applications on March 25 because each applicant had written ''voluntary union organizer'' or words to that effect on the form itself.[5] We adopt these findings, but we shall leave to compliance the determination of two remedial issues: (1) whether the Respondent's welder job offer to Myers on October 14 was bona fide and affected in any way his reinstatement and backpay rights; and (2) whether the Respondent would have hired any of the 18 applicants disqualified on March 25 if it had used nondiscriminatory hiring criteria.

With respect to the first issue, the judge ordered immediate reinstatement and a make-whole remedy for Myers. The Respondent excepts because the judge failed to take into account the testimony of Kevin Evans, the Respondent's field personnel manager, concerning his contacts with Myers in October. Evans testified that, on October 14, he tried to contact Myers about an ironworker, structural welding position with the instrument fitter crew working at the Jacksonville jobsite. Evans testified that he did not speak with Myers, but left a message on Myers' telephone answering machine that morning. Evans further testified that when Myers returned his call on October 20, the welder's job had already been filled earlier that day. According to Evans, it was during this October 20 conversation that Myers allegedly said that he was already working out of state and would be there for at least 2 more weeks. Given these circumstances, we believe that questions concerning these events are best left for the compliance stage of these proceedings.

Regarding the second issue, the judge recommended backpay and immediate employment offers for the 18 employees named in the complaint whose applications were disqualified by the Respondent on March 25. We find that such remedy, while appropriate for a refusal-to-hire violation, is overbroad here when the violation alleged in the complaint, litigated by the parties, and found by the judge is a refusal to *consider* the applicants for employment. Therefore, we shall leave to compliance the determination of which discriminatees would actually have been hired if the Respondent had used nondiscriminatory hiring criteria.[6] See *Ultra-*

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

[3] In the absence of exceptions, we adopt the judge's Sec. 8(a)(1) findings based on the unlawful threats and overtime offers made by Supervisor Denham to employees Scott French and Russell Myers. There were also no exceptions to the judge's dismissal of the 8(a)(1) allegation pertaining to the Respondent's comments about the distribution of union literature by employees at the jobsite.

In fn. 6 of his decision, the judge stated that the employer in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), is the parent company of the Respondent when, in fact, the record reveals no such relationship between the two companies. Thus, we do not rely on this misstatement by the judge.

We shall also add a reference to *New Horizons for the Retarded*, 283 NLRB 1173 (1987), to par. 2(b) of the Order. This citation appears to have been inadvertently omitted by the judge.

[4] All dates are in 1992 unless otherwise indicated.

[5] We note that the Supreme Court recently agreed with the Board that job applicants who are also paid union organizers are nevertheless employees within the meaning of Sec. 2(3) of the Act and are, therefore, entitled to its protection. See *NLRB v. Town & Country Electric, Inc.*, 116 S.Ct. 450 (1995).

[6] Such consideration by the Respondent shall commence as of the date of their applications set forth opposite their names below.

Joey D. Crews	February 26, 1992
James R. Batton	February 26, 1992
Cecil Estes	January 21, 1992
James D. Dixon	February 26, 1992
Howard W. Gauthier	February 26, 1992
Rickey W. Hurst	February 26, 1992

Continued

systems Western Constructors, 316 NLRB 1243 (1995); *Fluor Daniel, Inc.*, 304 NLRB 970, 981 (1991); *D.S.E. Concrete Forms*, 303 NLRB 890, 898–899 (1991). Thus, in rejecting the judge's traditional make-whole remedy and immediate employment offers, we shall permit the Respondent to introduce evidence, during the compliance proceedings, that these discriminatees would not have been hired after the dates indicated on their application forms in any event. The Respondent shall, however, bear the burden of proving that the employees hired after the application dates of the discriminatees actually had superior qualifications over the discriminatees. See *D.S.E. Concrete Forms*, supra.

Consequently, to remedy the Respondent's unlawful refusal to consider these 18 employee-applicants for hire, we shall order it to consider them for hire and to provide backpay to those whom it would have hired but for its unlawful conduct. See *Ultrasystems Western Constructors*, supra. In addition, if at the compliance stage of this proceeding it is determined that the Respondent would have hired any of the 18 employee-applicants, the inquiry as to the amount of backpay due these individuals will include any amounts they would have received on other jobs to which the Respondent would later have assigned them. Ibid. Finally, if at the compliance stage it is established that the Respondent would have assigned any of these discriminatees to current jobs, we shall order the Respondent to hire those individuals and place them in positions substantially equivalent to those for which they applied at the jobsite at Jacksonville, Florida. Ibid.[7]

2. The General Counsel seeks a violation of Section 8(a)(1) of the Act based on the Respondent's adoption and maintenance of its ''extraneous information'' policy to disqualify job applications with ''voluntary union organizer'' or words to that effect written on them. In response, the Respondent argues that its ''extraneous information'' policy does not constitute a ''per se'' violation, that is, a policy unlawful on its face regardless of its application. For the reasons below, we agree with the General Counsel's position, find this additional violation, and modify the Order and the notice to employees accordingly.

Paragraph 9 of the consolidated complaint alleges that the Respondent ''has adopted and maintained'' a policy to disqualify job applicants who provide additional, unrequested information on their job applications, ''including the information that the applicant is a volunteer union organizer.'' In its answer, the Respondent admitted the allegations contained in paragraph 9, but denied that its conduct interfered with, restrained, and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

In the ''Statement of the Case'' section of his decision, the judge referred to the complaint as alleging as unlawful the ''maintaining'' of this disqualification policy. In footnote 5 of his decision, the judge correctly states that the General Counsel's argument is that both the ''policy, and its application, is 'inherently destructive' of Section 7 rights.'' Then, in the ''Analysis and Conclusions'' section of his decision, the judge extensively analyzed the adoption of this ''extraneous information'' policy in considering the ''inherently destructive'' theory argued by the General Counsel and in rejecting the Respondent's neutral considerations for establishing its ''extraneous information'' policy. In this connection, the judge relied on evidence that showed that the Respondent's adoption of this policy was ''in large part in response to union activity.''[8] In addition, he noted the consistent testimony of the Respondent's vice president of employee relations that revealed that this policy had been developed in the context of the Respondent's awareness that unions were encouraging their members to write ''volunteer union organizer'' on their applications for work at nonunion companies.[9] In the ''Conclusions of Law'' section of his decision, however, the judge did not separately conclude that the adoption and maintenance of the Respondent's ''extraneous information'' policy itself violated Section 8(a)(1).

We view this failure to separately conclude that the adoption and maintenance of the ''extraneous information'' policy is an independent violation of Section 8(a)(1) as an inadvertent oversight on the judge's part. The rationale for finding this additional violation is fully encompassed within the judge's analysis for finding unlawful the contested enforcement of the Respondent's ''extraneous information'' policy. As previously indicated, we adopt that analysis and those findings. Therefore, we find that the Respondent violated Section 8(a)(1) of the Act by adopting and maintaining its ''extraneous information'' policy as alleged.

Samuel H. Lindsey	February 26, 1992
Hans L. Mayberry Jr.	February 26, 1992
Kenneth Messer	February 26, 1992
Lathan B. Nelson	February 26, 1992
Ronald L. Ford	February 27, 1992
David B. Gossage	February 27, 1992
Jess W. Hodges	February 27, 1992
Gregory H. Reynolds	February 27, 1992
Arthur S. Tison	February 27, 1992
Lewis A. Shingler	February 28, 1992
Joseph R. Truett	March 3, 1992
David Hargrove	March 4, 1992

[7] Should any of these employee-applicants be entitled to backpay, it shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[8] The Respondent does not except to this portion of the judge's decision.

[9] The Respondent does not except to this portion of the judge's decision.

3. The consolidated complaint alleges that on March 3 the Respondent unlawfully ''threatened its employees by stating that an employee had been discharged in retaliation for the employee's organizing activities.'' Without contradiction, employee Mathew Jonjock testified about his March 3 conversation with Foreman Earl Frederick, his supervisor. That day, Jonjock had reported for work wearing various union insignia and a vest identifying him as a ''voluntary union organizer.'' According to Jonjock's testimony, Frederick told him that ''I terminated you yesterday. Your organizing days is over, boy.''

The General Counsel argues that Frederick's statement connecting Jonjock's union activity with his discharge establishes that the Respondent threatened an employee in violation of Section 8(a)(1). Although the judge acknowledged this statement by Frederick, he failed to pass on whether it constituted an independent violation of Section 8(a)(1), irrespective of whether Jonjock's termination itself violated the Act. We find merit in the General Counsel's argument. An employer's statement linking an employee's union activity to his discharge violates Section 8(a)(1). See *Fontaine Body & Hoist Co*., 302 NLRB 863, 866 (1991).[10]

ORDER

The National Labor Relations Board orders that the Respondent, H. B. Zachry Company, Jacksonville, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with physical violence; threatening employees that they are on a ''hit list''; threatening employees that their ''days are numbered''; threatening employees that they will not be allowed to perform boiler welding; and threatening employees that they will not get overtime work, as well as other reprisals, because of their activities on behalf of, or support for, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO.

(b) Offering overtime work to employees in order to dissuade them from engaging in activities on behalf of, or supporting, the Union.

(c) Making statements to an employee linking his discharge with the fact that he had engaged in protected union activity.

(d) Issuing written reprimands to employees, failing to recall employees, and discharging employees because of their activities on behalf of, or support for, the Union.

(e) Failing and refusing to consider for hire applicants who identify themselves as a ''volunteer union organizer'' or words to that effect on their application forms.

(f) Adopting and maintaining a policy of disqualifying job applicants who provide additional, unrequested information in their applications, including the information that the applicant is a volunteer union organizer.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its policy of disqualifying job applicants who provide additional, unrequested information in their applications, including the information that the applicant is a volunteer union organizer.

(b) Offer Scott French and Russell Myers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the judge's decision, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Make whole the employee-applicants named below for any losses they may have suffered by reason of the Respondent's discriminatory refusal to consider them for hire in the manner described in this Decision and Order. Offer those employee-applicants named below, who would currently be employed but for the Respondent's unlawful refusal to consider them for hire, employment in the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by the Respondent.

[10] Nonetheless, we find that, even assuming this additional unlawful statement establishes the General Counsel's prima facie case of discrimination for Jonjock's discharge, the Respondent met its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 453 U.S. 989 (1982). The Respondent showed that Jonjock was fired for cause—poor work performance on February 28—and that this same action would have taken place even in the absence of his protected union activity.

Joey D. Crews	Lathan B. Nelson
James R. Batton	Ronald L. Ford
Cecil Estes	David B. Gossage
James D. Dixon	Jess W. Hodges
Howard W. Gauthier	Gregory H. Reynolds
Rickey W. Hurst	Arthur S. Tison
Samuel H. Lindsey	Lewis A. Shingler
Joseph R. Truett	Hans L. Mayberry Jr.
Kenneth Messer	David Hargrove

(d) Remove from its files any reference to the reprimands issued to Russell Myers and to the discharge of Scott French and notify them in writing that this has been done and that the reprimands and discharge will not be used against them in any way.

(e) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its jobsite in Jacksonville, Florida, copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid and protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with physical violence; threaten employees that they are on a ''hit list''; threaten employees that their ''days are numbered''; threaten employees that they will not be allowed to perform boiler welding; or threaten employees that they will not get overtime work, as well as other reprisals, because of their activities on behalf of, or support for, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO.

WE WILL NOT offer overtime work to employees in order to dissuade them from engaging in activities on behalf of, or supporting, the Union.

WE WILL NOT make statements to an employee linking his discharge with the fact that he had engaged in protected union activity.

WE WILL NOT issue written reprimands to employees, fail to recall employees, or discharge employees because of their activities on behalf of, or support for, the Union.

WE WILL NOT fail and refuse to consider for hire applicants who identify themselves as ''volunteer union organizer'' or words to that effect on their application forms.

WE WILL NOT adopt and maintain a policy of disqualifying job applicants who provide additional, unrequested information in their applications, including the information that the applicant is a volunteer union organizer.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our policy of disqualifying job applicants who provide additional, unrequested information in their applications, including the information that the applicant is a volunteer union organizer.

WE WILL offer immediate and full reinstatement to Scott French and Russell Myers to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discrimination, less any net interim earnings, plus interest.

WE WILL make whole, together with interest, those employee-applicants named below for losses they may have suffered by reason of our discriminatory refusal to consider them for hire in 1992 in the manner described in the Decision and Order, and WE WILL offer those employee-applicants named below, who would currently be employed but for our unlawful refusal to consider them for hire, employment in the positions for

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if we had not discriminated against them.

Joey D. Crews	Lathan B. Nelson
James R. Batton	Ronald L. Ford
Cecil Estes	David B. Gossage
James D. Dixon	Jess W. Hodges
Howard W. Gauthier	Gregory H. Reynolds
Rickey W. Hurst	Arthur S. Tison
Samuel H. Lindsey	Lewis A. Shingler
Joseph R. Truett	Hans L. Mayberry Jr.
Kenneth Messer	David Hargrove

WE WILL notify Russell Myers and Scott French that we have removed from our files any reference to the reprimands issued to Myers and the discharge of French, and that the reprimands and the discharge will not be used against them in any way.

H. B. ZACHRY COMPANY

Peter J. Salm, Esq., for the General Counsel.
Lewis T. Smoak, Dion Y. Kohler, and *C. Thomas Davis, Esqs. (Ogletree, Deakins, Nash, Smoak & Stewart)*, of Greenville, South Carolina, for the Respondent.
Michael T. Manley, Esq. (Blake & Uhlig, P.A.), of Kansas City, Kansas, for the Union.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case on March 8, 9, 10, 30, 31, and April 1 and 2, 1993, in Jacksonville, Florida. The charges which gave rise to this case were filed by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO (the Union or Charging Party), on April 10 and May 11, 1992, respectively, against H. B. Zachry Company (Respondent). The charges were later amended on several occasions between April and October 1992. On November 27, 1992, an order consolidating cases, consolidated complaint, and notice of hearing issued.

The consolidated complaint alleges that Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by various threats made to employees, by articulating an unlawful prohibition on all jobsite distribution of union literature, by terminating employees Mathew A. Jonjock and Scott F. French, by issuing written disciplinary reprimands to Russell Myers and refusing to recall Myers from a layoff, and by maintaining and enforcing a policy that disqualified applicants for work who wrote on their applications ''volunteer union organizer'' or words to that effect.

In its answer to the consolidated complaint, Respondent admitted certain allegations including the filing and serving of the charges; its status as an employer within the meaning of the Act; the status of the Union as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and/or agents of the Respondent within the meaning of Section 2(2), (11), and (13) of the Act. Respondent denied having engaged in any conduct that would constitute an unfair labor practice within the meaning of the Act.

At the trial here, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, all parties filed timely briefs with me that have been duly considered. On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

H. B. Zachry Company is, and has been at all times material, a Delaware corporation engaged throughout the United States as a general contractor in the heavy construction industry. In the course and conduct of its business operations, Respondent annually purchases and receives goods and materials valued in excess of $50,000 directly across state lines. Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background of the Union Organizing Campaign*

Respondent is a nonunion contractor engaged in boiler construction and repair throughout the United States. For at least a decade the Union has been attempting to organize Respondent's employees at various locations.[1] The case at hand involves the construction of a coal-fired power plant owned by AES Cedar Bay, Inc. at Jacksonville, Florida, where Respondent is the general contractor. The power plant has been under construction since early fall 1991.

Respondent began to hire large numbers of employees in late 1991 and early 1992. Among these early employees were several members of the Union who had been given permission, and in fact encouraged, by the Union to take jobs with Respondent. After several of its members were working for Respondent, in late February 1992 the Union began an open campaign on the jobsite through these members to solicit authorization cards from other employees.

In late February, as more fully discussed below, four of Respondent's employees who were members of the Union went to management and formally identified themselves as a ''union organizing committee.'' From that point on, an open organizing campaign was conducted with union members and other union supporters identifying themselves with various badges, stickers, and other insignia. Union members and other union supporters openly solicited authorization cards

[1] See *H. B. Zachry Co.*, 261 NLRB 681 (1982), and *H. B. Zachry Co.*, 266 NLRB 1127 (1983), involving a project or projects at Roxboro, North Carolina, and *H. B. Zachry Co.*, 289 NLRB 838 (1988), involving a project at Chesapeake, Virginia.

from Respondent's employees during breaks and lunchtime, as well as before and after work.

B. *Events of February 27*

On February 27, a group of five employees went to Respondent's jobsite office and asked to speak to Project Manager William Cooksey. The group was told that Cooksey was unavailable, so they met instead with Field Personnel Manager Kevin Evans. The group gave Evans a letter identifying themselves as an organizing committee and announcing their intent to organize Respondent's employee at the jobsite on behalf of the Union. The group also stressed the fact that it planned ''on doing the job that we were hired for in a timely manner.'' It is undisputed that Evans told the group he could not stop them from organizing. What is disputed is what Evans said next.

Employee William Prombo, who was one of the five employees, testified that after telling the group he could not stop them from organizing, Evans then stated that they were not to ''bring in any literature or [do] any organizing during working hours *or any literature on the jobsite*.'' (Emphasis added.) Employee Mathew Jonjock's version was much different. Jonjock testified:

> [Evans] told us that there wasn't nothing he could do about us organizing, but for us to do it on our own time and not to pass out no literature on their time. Pass it out, if we're going pass any out, on our time.

Only in later testimony in response to leading questions from counsel for the General Counsel did Jonjock recall that Evans allegedly said, ''[W]e couldn't pass out no literature on the job whatsoever.''

Field Personnel Manager Evans denied forbidding the employees to bring any union literature on the jobsite.

I am not convinced that in this meeting and during his remarks to employees Evans outright forbid employees from bringing union literature on the jobsite. It is of course possible that Evans did so, but it appears that even if he did, the employees immediately recognized Evans' statement to be a slip of the tongue or, at worst, a misstatement. Employees Prombo and Jonjock both admitted that they never hesitated to distribute union literature to other employees on the jobsite following this meeting with Evans. Both also admit that they did so openly during breaks and that management never attempted to interfere with these activities.

Careful analysis of Jonjock's testimony reveals, however, that there is considerable doubt whether Evans even committed this misstatement. Jonjock first testified spontaneously that Evans told employees ''not to pass out no literature on their [company] time.'' Evans went on to say, ''[P]ass it out, if we're going to pass any out, on our time.'' It was only later, in response to leading questions from counsel for the General Counsel that Jonjock asserted Evans stated, ''[W]e couldn't pass no literature on the job whatsoever.''

Under these circumstances, I credit Evans' denial that he forbid employees to bring any union literature on the jobsite. I find Evans told employees that Respondent could not prohibit them from organizing, but that they were to do it on their own time and they were not to pass out any union literature during working time.

C. *The Discharge of Mathew Jonjock*

Mathew Jonjock is one of the union members who, with the Union's permission, sought and obtained employment with Respondent at the Jacksonville jobsite. Jonjock worked as a boilermaker fitter/rigger from February 3 until he was discharged on March 3. Jonjock apparently engaged in no significant union activities until late February 1992, when he and the four other employees met with Field Personnel Manager Evans on February 27 to identify themselves as an employee organizing committee. After the meeting with Evans on February 27, Jonjock gave out union authorization cards to at least two employees. Also on February 27, Jonjock and other members of this organizing committee began to displaying union stickers on their lunchboxes and hard hats. They also began wearing badges identifying themselves as being on this committee.

On Friday, February 28, prior to starting work, Jonjock and other members of the organizing committee met with Project Manager Cooksey. The group told Cooksey that they wanted a place to wash their hands, a clean place to eat lunch, and a wage increase. Cooksey told the employees that he had not yet had time to run water to the project and denied the group's other request. The meeting ended, and employees went to work.

As it relates to Jonjock, what happened the rest of the day on February 28 is very much in dispute. Boilermaker/Rigger General Foreman Earl Roark testified that he and Supervisor Earl Frederick assigned Jonjock to install four steel I-beams to an air-driven structural lifting device that would be used to help lift the boiler into place. According to Roark, Jonjock was the fitter in a crew of three and was responsible for placing the I-beams in the correct location before they were welded. Nathan Hand was working as Jonjock's helper, while Donald Tuey was the welder. Jonjock denies he was even assigned these duties. Jonjock had been injured on February 20 and, according to him, he was still assigned to light-duty work. Jonjock asserts that his duties on February 28 were to fabricate hanging rods and a basket for a water keg. Jonjock testified that during the workday Foreman Earl Frederick did ask him to stand watch briefly over a hole in which some of Roark's crew were installing the I-beams in question. According to Jonjock, he simply watched over the open hole for about 30 to 40 minutes while Roark's crew went to get some tools and equipment.

None of the parties called Frederick, who no longer works for Respondent, or Hand or Tuey as witnesses to resolve this conflict about Jonjock's duties. I credit Roark, who impressed me as a spontaneous and forthright witness. Even assuming Jonjock was limited to light duties, it appears that his role in the installation of the I-beams was primarily one of seeing to it that they were aligned properly. The job involved little, if any, heavy labor.

Roark testified credibly that Jonjock caused the first I-beam to be installed improperly, not square and not on center line. Roark testified that he overheard a conversation between Foreman Frederick and Jonjock when Frederick confronted Jonjock with the error. Roark overheard Jonjock tell Supervisor Frederick that Roark had told him to put the beam where they had welded it. Roark overheard Jonjock's excuse and informed Frederick that he had not told Jonjock to install the beam as alleged, but rather told Jonjock the proper way to install the beam. On this first beam, Frederick

then simply told Jonjock to cut the beam out and reinstall it properly. Jonjock and the other crewmembers did so. They then installed a second beam correctly.

Foreman Roark testified credibly that Jonjock caused the third I-beam to again be installed off center. Roark and Frederick discovered this third beam had been installed improperly, but apparently corrective action was not possible that day because cutting out the beam and reinstalling it would take several hours.

Boilermaker Superintendent Roger Reed testified credibly that at about 4 p.m. that day Jonjock approached him and asked Reed if he was the superintendent. Reed said he was. Jonjock then asked if he could ask Reed some questions. Reed said yes, and Jonjock then asked what were ''the ways a man could be terminated on the job.'' Reed responded by listing examples, including attendance problems, production problems, and safety. Jonjock then asked if a man could be terminated ''for being afraid to go up on the iron.'' Reed answered, ''[N]ot necessarily,'' after which the two briefly discussed Zachry's policy regarding working aloft on steel beams when it is raining. Jonjock then stated that Respondent's safety policy ''sucked'' and that ''everybody at the main office was a bunch of unorganized dumb asses.'' Reed responded that he could not argue with that. Jonjock then stated, ''Well, I just don't want to lose my job,'' after which he returned to work. Jonjock denies this conversation even took place. As between Reed and Jonjock, I found Reed straightforward and more credible. I find that the conversation occurred as Reed described.

At or near 5:30 p.m. quitting time that day, Supervisor Frederick sent employee Nathan Hand back up onto the boiler structure to retrieve a grinder. When Hand returned to the ground, Frederick told Hand he was going to issue him a 3-day suspension for going onto the boiler structure without wearing his safety belt. Jonjock, who rode to and from work with Hand, overheard the conversation. Jonjock protested to Frederick, saying that he did not think it was ''worth a shit'' for Frederick to give Hand the suspension. Frederick may well have, as Jonjock testified, instructed him and Hand to accompany Frederick to the superintendent's trailer, telling Jonjock, ''We're going to get your money.'' It was at about that point that Superintendent Roger Reed and General Foreman Ronnie Stewart approached. The accounts of the conversation which then took place are considerably different in detail, but of the same substantive effect.

Reed asked what was happening. Frederick told him of Hand's suspension and may or may not have referred to terminating Jonjock. Jonjock continued to speak in Hand's defense. Reed told Jonjock to mind his own business, and to leave. Jonjock insisted that if he was being fired, he wanted his money. Superintendent Reed told Jonjock that he was not being fired and he should simply leave. Jonjock noted that he rode to and from work with Hand, and Reed then told Jonjock he should wait for Hand in the parking lot. The subject of Jonjock being terminated may have come up once more, and if it did, Reed again assured Jonjock that he was not being discharged. Jonjock then went to the parking lot to wait for Hand. Hand apparently was issued a 3-day suspension.

Reed and Stewart testified credibly about yet another confrontation with Jonjock that afternoon. Reed and Stewart testified that as they were leaving the worksite that afternoon, they met Jonjock, who had pulled his truck into the middle of the road where he was waiting for Hand. Reed and Stewart both testified that Jonjock yelled out to Reed, asking Reed if he was going to have Jonjock's money for him on Monday. Reed said no, and told Jonjock to ''forget it.'' Jonjock then responded, ''You [or you all] are too chicken shit to fire anyone.'' Reed, hoping to avoid further confrontation, simply said, ''Yea, right,'' and left. Jonjock denied that this exchange ever took place. I found Reed's and Stewart's testimony to be forthright and altogether credible. I find that the exchange occurred as they described it.

Reed testified that when he got home on the evening of February 28 he spoke with Earl Frederick, who lived across the street, about the day's events. In this conversation, Reed learned that Jonjock had installed the second I-beam incorrectly that day. Reed told Frederick he would look at Jonjock's work the next morning. Thus, on Saturday, February 29, Reed and T. W. Wheat, Respondent's other boilermaker superintendent, met at the jobsite to inspect this situation. Reed testified that on seeing the second I-beam that Jonjock had installed improperly he concluded that based on this obviously poor work, Jonjock's bizarre questions about ways of getting fired, and Jonjock's challenge to Reed to fire him that Jonjock has acted intentionally in doing this work incorrectly. Reed and Wheat called Field Personnel Manager Kevin Evans to review these facts. Evans in turn telephoned his superior in San Antonio, Texas, to further discuss this situation. It was ultimately decided that either Jonjock had intentionally committed these errors or that he was so lacking in skills he could not qualify as a boilermaker fitter/rigger. The decision was made to terminate Jonjock.

On Monday, March 2, Jonjock called in sick, and did not come to work. When Jonjock reported to work on Tuesday, March 3, Jonjock was informed that he had been terminated. Jonjock arrived at work that morning wearing various union insignia and a vest identifying him as a union organizer. Jonjock testified (without contradiction, since Frederick was not called as a witness) that as he approached Foreman Frederick that morning, Frederick stated, ''I terminated you yesterday. Your organizing days is over, boy.'' Frederick then instructed Jonjock to turn in his safety equipment at the warehouse and wait for Frederick. Soon thereafter, Frederick brought Jonjock his final paycheck and a termination slip. Neither this slip nor Frederick told Jonjock why he was being discharged.[2]

D. *Late March 1992: Respondent's Rejection of Applications*

Beginning in late January and continuing throughout February 1992, at least 18 individuals applied for work with Respondent whose applications identified themselves as ''volunteer union organizer'' or words to that effect. None of these individuals were hired. After union activity began to be engaged in openly in late February as described above, on March 25, 1992, these 18 individuals were sent identical let-

[2] The second half of Jonjock's termination slip, filled out and signed by Frederick on March 2, explains the reason for discharge as failure to follow instructions. Superintendent Reed testified credibly that it was he who made the decision to discharge Jonjock because, as described above, he concluded Jonjock had intentionally installed the I-beams incorrectly.

ters by Respondent notifying them that their applications for employment had been disqualified because the application had not been completed in accordance with instructions. The letter informed these individuals that they were free to reapply. Respondent's application for employment contains a statement that reads: ''Provide only the information requested. Failure to do so will result in disqualification of your application.''

The parties stipulated that 14 of the 18 individuals referred to above were disqualified for employment solely because they wrote ''volunteer union organizer'' or words to that effect on the application. Respondent contends that the applications of four individuals were disqualified for additional reasons, specifically incompleteness of the application.

Respondent's policy regarding disqualification of applications is set forth in its Field Personnel Procedures Manual. The policy states that ''grossly and obviously incomplete'' applications are to be disqualified. The manual gives no definition or explanation for what is ''grossly'' or ''obviously'' incomplete. The manual also directs that any application containing nonresponsive information should be disqualified. Nonresponsive is defined as ''when an application reflects any information not requested on the application form.''

The record reflects that Respondent hired at least 59 individuals at the Jacksonville jobsite despite the fact that those individuals failed to provide a complete work history on their applications. All of those 59 individuals left blank spaces in the work history section of their applications. The record also reflects that Respondent hired at least eight individuals to work at the Jacksonville project who, while indicating they had a license to operate equipment, failed to note either the type or make of equipment they were qualified to operate.

E. *April 1992: The Discharge of Scott French*

Scott French began working for Respondent at the Jacksonville project in early January 1992. French was a welder who primarily performed structural welding. French did not engage in any union activities until he signed a union authorization card on February 8. On March 2, French started wearing a union sticker on his hard hat and displaying one on his lunchbox.

French testified that on March 4 he approached leadman Rodney Miles in the south fabrication yard at the jobsite to ask Miles about a rumor French had heard about the job shutting down. Boilermaker Foreman Ray Pruitt and Rigger Foreman Dan Croft were standing with Miles when French approached. French testified credibly that when he asked Miles about the rumor, it was Pruitt who responded, ''Well, you'll have plenty of time to join the Union then.'' French told Pruitt that he was ''just trying to get a right to vote to get the Union in.'' Pruitt and French then discussed the stickers French was wearing on his hard hat. French testified credibly that Pruitt ended the conversation as follows:

> He said if Zachry shut down, ended up shutting down and pulling out, that he would whip my ass and anybody else's ass that had anything to do with trying to get the Union on the job and all that, next time he saw them at the beer joint.

Pruitt no longer works for Zachry, and Respondent did not call Pruitt as a witness. Respondent represented that it had attempted to find Pruitt, but it had been unable to locate him. Neither did Respondent call Rigger Foreman Croft as a witness.

In early April, French became a volunteer union organizer and started wearing a vest and button identifying himself as such at the jobsite. Shortly thereafter, Foreman Yarby Denham took over Foreman Pruitt's crew and became French's immediate supervisor.

French testified credibly about a conversation that Supervisor Denham had with him and fellow employee Russell Myers on April 15. On that day French asked Denham if employees were going to start getting some overtime. French testified credibly Denham responded that French was on supervision's ''hit list,'' but that if French would take off his union vest and button and stop organizing, Denham would get him back on the better side of supervision and get him some overtime. Employee Russell Myers was standing about 4 to 5 feet behind French when Denham made this remark. Myers testified credibly corroborating French. Myers particularly recalled Denham's mention of a ''hit list.'' Denham denied the conversation.

French recalled Denham saying that he was on management's ''hit list,'' but would get on the better side of management if he would remove his union insignia. Myers recalled that Denham said he would take French's and Myers' names off the ''hit list'' if they would remove their insignia. These minor differences tend to enhance, rather than retract from, their credibility, for such minor differences are to be expected when two different individuals recall the same event. I credit the testimony of French and Myers concerning this conversation.

On Friday, April 17, French was assigned to a five-person crew to do the first boiler tube welding on the job. French had approximately 9 years' experience welding prior to coming to work for Zachry. During March or early April, French took and passed both a thin-wall tube test and a heavy-wall tube test.[3] Foremen Anthony Mollica and Tony Boatman were placed in charge of the newly formed crew of five, which included French, Mike Moukakas, and three other welders. French and Moukakas worked as a team. On April 17, the crew did not start welding until the afternoon, and continued working until 7:30 or 8:30 p.m., several hours after the normal quitting time. Foreman Mollica admitted that it was a very hectic day. In addition, it was necessary to work so late because the boiler tubes were suspended by an air tugger system and had to be completed in order to support their own weight.

According to French, after the crew finished welding on the evening of April 17, Foremen Mollica and Boatman inspected everyone's welds and declared them to be fine. Mollica testified that neither he nor Boatman inspected any of the welds on the evening of April 17 and denies declaring them fine. I have no doubt that Mollica did not allow the welders to go home that evening without some inspection to make sure the welds were structurally supportive, but I also

[3] As on most jobs of this kind, there were basically two types of welding at the Jacksonville job, structural welding and tube welding. Structural welding refers to the welding of structural steel, usually in plate form. Tube welding, also known as boiler welding, refers to the welding of boiler tubes and other items subject to extreme pressure during a boiler's operation. Tube welding is considered more difficult and more critical.

find the welds done that day were not carefully and closely inspected.

On Saturday, April 18, Foremen Mollica and Boatman returned to the jobsite along with two welders Mollica brought in to complete four welds that had been inaccessible on the previous day. Mollica testified credibly that on that Saturday morning, he discovered five welds, the ones performed by French, that were clearly unacceptable. Mollica described these welds as being cold welds which had bad starts and were filled with porosity.

Mollica testified that on Monday, April 20, when the entire crew was back on the site, Mollica met with Boilermaker Welder General Foreman Yarby Denham and told Denham about the problem welds. Denham went and inspected the welds with Mollica, and the two decided they had to be rewelded. I credit Mollica and Denham that they then spoke with French and instructed French to grind down these welds and to recap them.[4] I credit French that Denham stated at that time if French did not get the welds right Denham would bust him back to doing structural welding at a dollar less per hour. French responded that he would get the welds right. Mollica and Denham testified that French then attempted to reweld as instructed. French referred to his work as simply cleaning up the starts and stops on a weld. What is undisputed is the fact that Denham was not satisfied with the rework, and Denham told French that he would have to start over a second time. French then ground down and rewelded the welds a third time.

French testified that his rewelding work was fine. Nevertheless, later in the morning on April 20, Denham came back to French and told French that he was discharging French because French was an inexperienced welder.

Foreman Denham and Mollica both testified that in performing the second reweld French grounded down into the boiler tube itself. Mollica testified that grinding into a boiler tube simply does not happen to a journeyman tube welder and is wholly unacceptable. When Denham discovered that French had ground into the boiler tube, he discussed the situation with his supervisors and decided to discharge French. French was discharged and given a termination slip that stated that French was not a qualified welder.

There are so many differences and discrepancies between the testimony of French, Denham, and Mollica that discussing them in detail would unduly lengthen and burden this decision. I have provided what I believe to be a fair and credible account of the facts as gleaned from a composite of the testimony of all three. Regarding some of the details, I have, without specifically saying so, credited Mollica over French. I did not so much find French to be unworthy of belief as I found Mollica to testify as if he were a totally disinterested witness. Even though Mollica was French's supervisor, it was Denham who made the decision to discharge French. Although I do not credit any of the three regarding all details, I was particularly impressed with Mollica as a straightforward witness who bore no hostility whatever toward French and who genuinely believed French's work to be substandard. On the other hand, I specifically credit French that Denham told French if he did not get the work done right, he would be busted back to performing structural welding at a dollar an hour less. When French failed to perform the welds to his satisfaction, however, Denham discharged French.

[4] I do not credit French that Mollica and/or Denham instructed all of the welders that welds needed to be ''cleaned up.'' Mollica and/or Denham, however, may well have used that terminology with French.

F. *Reprimands Issued to Russell Myers and Failure to Recall Myers from Layoff*

Russell Myers started working for Respondent at the Jacksonville project in mid-December 1991 as a welder. Myers, who had 18 years' experience as a welder in the construction industry, was not a member of the Union prior to going to work for Respondent at the Jacksonville jobsite. In late February or early March 1992, Myers heard that the Union was trying to organize Respondent's employees and talked favorably about the Union to other employees. In early April 1992 Myers became a member of the Union's volunteer ''organizing committee.'' At that time, he began wearing a vest labeling him as a member of that committee, a large union emblem, and various stickers. Myers then started talking to other employees and trying to get them to sign union authorization cards.

Myers worked under the supervision of Yarby Denham. It was common knowledge that people who worked on the boiler would be paid more per hour for doing so and would almost certainly get substantial overtime. Myers testified credibly that in early April after he started wearing the ''organizing committee'' vest Denham commented to him one day that if Myers kept wearing the union insignia he would not be welding on the boiler. Denham denied the conversation. Denham testified that in early April Myers was probably already working on the boiler, but the record is quite clear that no welding began on the boiler until April 17. Denham denied this conversation with Myers, but as between Myers and Denham, I have no trouble crediting Myers that the conversation occurred as he described it.

Myers also testified credibly about another similar conversation he had with Denham on April 9. Myers testified that on April 9, around quitting time, he was standing with three or four other employees when Denham walked up and joined the conversation. Myers was wearing his union vest and other insignia. Myers testified credibly that during the conversation Denham commented that if Myers did not take off his union insignia he was not going to be welding on the boiler and was not going to get any overtime. Myers testified that in this second conversation Denham added that as things were your ''days are numbered.'' Denham denied this conversation as well. I again credit Myers over Denham.

On April 15, just a week after the second conversation Denham had with Myers, Denham had yet a third conversation along the same lines with both Myers and French. This conversation is discussed in detail above in the section dealing with French's discharge. It was in this conversation that Denham offered to take French and Myers off Respondent's ''hit list'' and get them working on the boiler when they would get a lot of overtime if they would only take off their union insignia.

In spite of the several conversations with Foreman Yarby Denham during April, throughout the rest of April and all of May 1992 Myers continued to wear union insignia on his hard hat and lunchbox, as well as the ''organizing commit-

tee'' vest. Myers was successful in obtaining signatures from about 12 employees on union authorization cards.

On the morning of June 1, Myers took a break in his work area, as he had been doing regularly throughout his employment. Myers testified without contradiction that while there were no scheduled breaks other than lunchbreak employees customarily and regularly took a short morning break and a short afternoon break at or near their work area. On this occasion, Myers squatted down, opened his cooler, took out a sandwich, and poured a cup of coffee from his thermos. At about that point, Boiler Superintendent Roger Reed approached Myers. Reed started a conversation with Myers by telling Myers that he needed to eat his breakfast at home. Myers responded that he was letting his welding machine cool off. As Respondent's admits in its posttrial brief, ''This response angered Reed.'' Reed testified that Myers had ''almost all the contents of his [cooler] spread out like he was on a picnic.'' I do not credit Reed literally and, indeed, I find Reed's description significant only in that it reveals Reed's predisposed judgment of the situation. Reed took Myers' answer as being sarcastic, and told Myers that if his welding machine burned up Reed would buy Myers another one. Reed then told Myers pointedly to get back to work, and Myers did so.

Reed concedes that Myers went back to work when Reed specifically told him to do so. Nevertheless, later that same day, Yarby Denham issued Myers a written reprimand for sitting down eating a sandwich during work hours. It is undisputed that this was the first reprimand Myers had received on the job.

On June 15, Respondent issued Myers a second reprimand, allegedly for wasting time. At around 11 a.m. that day, Myers finished welding part of a duct on which he had been working. In order to complete the welding, Myers had to go down one flight of stairs so that he could weld an overhead part of the duct. To enable Myers to get up and weld the duct, a crew was building a scaffold for Myers. Because the scaffold was not yet completed, Myers took his tools down where he would need them and then went to the rod room to get welding rods. Myers testified that after returning he waited nearby for the scaffolding to be finished. Once it was, he went back to work. Myers testified that shortly after returning to work Foreman Scobic approached and wanted Myers to sign a reprimand for unwise use of time. Myers explained to Scobic that he had to wait for the scaffold to be built, but Scobic replied that Myers had been out of his work area. Scobic issued the reprimand to Myers that he had already prepared.

Foreman Mickey Scobic testified that he saw Myers go to the rod room to get rods. Scobic testified that after Myers returned he saw Myers get on the elevator. According to Scobic, when Myers had not returned after 20–25 minutes, Scobic went looking for Myers. Scobic claims that he found Myers several flights up, talking to a welder. According to Scobic, when he asked Myers what Myers was doing so far from his work area, Myers claimed that he was getting a toolbox. Scobic testified he told Myers he did not need any tools, that he had already wasted 30 minutes, and that Scobic was writing him up for unwise use of time.

Myers and Scobic offer extremely different versions of this incident. No party called any witness who might corroborate the testimony of either Myers or Scobic. Both Myers and Scobic offered detailed accounts of their actions and whereabouts that lead to the written warning issued to Myers. Both accounts are plausible to at least some extent. In the final analysis, however, I credit Myers. Myers impressed me as a spontaneous and straightforward witness. Scobic, however, appeared to embellish his testimony with certain alleged details that seem altogether implausible. Scobic testified, for example, that Myers took the elevator and went up several flights. Yet Scobic claimed that when he went looking for Myers, he chose to walk level by level looking for Myers. At the same time, Scobic could not remember certain other details, including the time of day when this happened, or even whether it occurred in the morning or afternoon. Myers' version, on the other hand, does not contain such implausible details on the one hand, or such gaps on the other. I find that the incident occurred as Myers described it.

On June 22, Respondent furloughed approximately 100 employees. Myers was one of those laid off. This furlough was later converted to a reduction-in-force on July 2. This reduction-in-force apparently constituted an indefinite layoff, but not a termination for, as will be seen, employees were later recalled.

At the time Myers was furloughed on June 22, he and other employees were told to come back on or about July 2 to pick up their paychecks. When Myers returned, he learned that the furlough had been converted to an indefinite layoff. Myers testified credibly that when he came back for his paycheck, Boilermaker Superintendent T. W. Wheat spoke with Myers and numerous other employees and told them that Respondent was having financial problems, but that as soon as it got more funding for the job, it was going to call employees back. For whatever reason, Wheat instructed these employees to fill out new applications, and Myers did so. Myers testified credibly that he also continued to check with Respondent's personnel office on a weekly basis.

Beginning approximately August 10, and continuing for some time thereafter, Respondent recalled numerous employees from this layoff.

Even after Respondent began to recall employees, Myers continued to check with Respondent's employment office. Each time, Myers was told that Respondent had nothing for him. Field Personnel Manager Kevin Evans testified that when Respondent began hiring back structural welders, he asked Superintendent Roger Reed if Reed would be interested in hiring Myers back. Reed said he would check with Foreman Yarby Denham. Denham told Reed that he did not want Myers back, and Reed passed this on to Evans. Nevertheless, when Myers spoke to Evans on August 16 to again seek work, Evans simply told Myers that Respondent did not need any structural welders at the time. Myers pointed out to Evans that he was also a certified pipe welder. Evans told Myers that he would check with the pipe department and let Myers know something the following week. Myers returned the following week, but Evans simply told him that no one was needed in the pipe department.

In fact, not only did Respondent recall welders from the June layoff, but when it began to recall employees on or about August 10, Respondent also began to hire new welders. As of the date of the trial here, Respondent had hired approximately 50 additional welders at the Jacksonville jobsite.

IV. ANALYSIS AND CONCLUSIONS

A. *The Discharge of Mathew Jonjock*

Although Mathew Jonjock denies even being assigned the work, I credit the testimony of Foreman Earl Roark, and I find that Jonjock was assigned as the fitter to install I-beams on February 28. I also find that Jonjock caused the first and third beams to be installed incorrectly. Finally, as Respondent argues, I find that Jonjock's behavior on February 28 gave Respondent reason to believe that Jonjock had intentionally caused these beams to be installed improperly.

There is no question that beginning in late February 1992, Mathew Jonjock was engaged in union organizing activity at Respondent's Jacksonville jobsite by attempting to organize employees. Moreover, there is no question that Respondent knew of these activities not only because they were engaged in openly, but also because Jonjock went with a group of fellow employees to meet with Respondent's management and identify themselves as an employee organizing committee. For reasons explained above, I do not find merit to counsel for the General Counsel's argument that Respondent unlawfully prohibited or constricted employees from distributing union literature at the jobsite. I shall therefore dismiss that allegation from the complaint. Instead, I find as described above Respondent told employees it could not prevent them from organizing a union, but that employees were to do so on their own time, during breaks and after work.

One thing I think it is fairly important to keep in mind in analyzing this case is that both Respondent and the Union, as well as many of the individuals involved, are fairly sophisticated and knowledgeable of labor law principles. Indeed, in describing its ''Fight Back Program'' through which the Union is attempting to organize the boiler craft industry, the Union even conducts classes and meetings with employee members to educate them about their legal rights and employers' legal responsibilities. On the other hand, Respondent has been confronted with several unsuccessful organizing attempts, and is itself very sophisticated and knowledgeable about its rights and its responsibilities. Such sophistication and knowledge can, and probably does, affect any and all of the principal actors in what they plan, what they actually do, and how they described it afterward. Being asked to analyze people's statements and actions in such circumstances undoubtedly provides a greater margin of error for the decision maker than other situations in which the parties involved are less conscious and less aware of the significance of their behavior. That having been said, I find with a considerable degree of confidence that Mathew Jonjock gave Respondent good reason to believe that he had intentionally performed substandard work, probably in order to bait Respondent into discharging him.

I agree with Respondent that Jonjock's conduct on February 28 was unusual, if not bizarre. I credit Reed that during the day on February 28 Jonjock approached him and asked about possible ways of getting fired by Respondent. Later that same afternoon, Jonjock not only went out of his way to defend fellow employee Nathan Hand, who was being issued a suspension, but more than once insisted on being given his last paycheck immediately, even after Reed assured Jonjock he was not being fired. Before everyone left the jobsite that afternoon, Jonjock again confronted Reed in the roadway near the parking lot, as he waited for Hand, telling Reed that Respondent was ''too chicken shit'' to fire someone.

The standard is now quite settled that in cases of alleged discrimination, the burden is first placed on counsel for the General Counsel to ''make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once that is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.'' *Wright Line*, 251 NLRB 1083 (1980). Although counsel for the General Counsel has proved that Jonjock was engaged in significant union activity and that Respondent was indeed aware of this, I find counsel for the General Counsel has failed to prove that protected conduct was a motivating factor in Jonjock's discharge. The credible record evidence shows that Jonjock, either intentionally or by gross negligence, erroneously installed two of four steel I-beams on or about February 28. It was this and Jonjock's other bizarre behavior on that day, and not Jonjock's protected union activity, which caused Respondent to discharge Jonjock. Accordingly, I dismiss that allegation in the complaint.

B. *The Discharge of Scott French*

Scott French also became involved with the union organizing campaign at Respondent's Jacksonville project from its inception. French was not among the group of employees who first identified themselves as an organizing committee. He did, however, sign a union authorization card and, beginning on March 2, start wearing a union sticker on his hard hat and on his lunchbox.

On March 4, French approached leadman Rodney Miles to ask about a rumor French had heard about the job shutting down. I have found, based on French's credible testimony, that Foreman Ray Pruitt injected himself into the conversation and threatened French that if the job shut down Pruitt would ''whip ass.'' I find Pruitt's threat of physical violence against French and other employees who might support the Union to be a clear violation of Section 8(a)(1) of the Act.

In early April, French became one of the employee ''union organizers'' and started wearing a vest and button identifying himself as such at the jobsite. I credit French and employee Russell Myers about a conversation they had with Foreman Yarby Denham in mid-April. After French asked Denham if employees were going to start getting overtime soon, Denham told French he was on Respondent's ''hit list.'' Denham then promised French that if French would take off his union vest and stop organizing, Denham would get him back on the better side of management and get French some overtime. I find Denham's statement that French was on Respondent's ''hit list'' and his promise to get French overtime if he would stop organizing both to violate Section 8(a)(1) of the Act.

Only a few days later, French was assigned to the first five-person crew to do boiler tube welding on the job. I have found that on the first day they performed such boiler tube welding, French performed certain welding that Foreman Anthony Mollica honestly believed to be substandard and unacceptable work. I credit French and find that Denham told him that if he did not get the work done right the next time, Denham would put French back to performing structural welding at a $1 an hour less. After rewelding the work, Fore-

man Mollica and Yarby Denham again found the work unacceptable. French, however, again failed to correct the work to Mollica's and Denham's satisfaction.

Instead of returning French to performing structural welding as Denham said he was going to do, Denham discharged French. The record convinces me that while French performed substandard welding on certain boiler tubes, Foreman Yarby Denham seized on this as an excuse to discharge French rather than return French to structural welding.

The record evidences several instances of animus on the part of Foreman Yarby Denham toward employee union organizing. In addition to the statements by Denham to French that French was on Respondent's ''hit list'' and Denham's offer of overtime to get French to cease organizing activity, Denham also evidence considerable union animus in other statements made to employee Russell Myers. In early April, Denham threatened Myers that if he did not take off union insignia, Myers was not going to get welding work on the boiler and was not going to get any overtime. In another conversation, Denham told Myers that his days are numbered. Counsel for the General Counsel has offered strong credible evidence of Denham's hostility toward employee union organizing.

French testified credibly that Denham first told French if French did not correct the rewelding properly, Denham was going to bust French back to being a structural welder at a $1 an hour less. When French again failed to perform the work properly, however, Denham chose to discharge French. The only reason offered by Respondent for not returning French to structural welding was that it was not ''hiring'' structural welders at that time. I find such reasoning circuitous at best, for it infers a presupposition that French stood in the same category as a nonemployee applicant. Respondent does not deny that there was structural welding to be performed, or that French had performed satisfactorily as a structural welder. Although a considerable amount of such welding was clearly available, Respondent simply points to the fact that it was not ''hiring'' new employees.

French's open support for the Union obviously rankled Denham as evidenced by both threats and promises from Denham to try to persuade French to cease such activities. When the opportunity arose shortly thereafter, Denham discharged French rather than assigning him other work. Counsel for the General Counsel has offered a strong prima facie case that French's union activity was a primary motivating factor in Denham's decision to discharge French. On the other hand, there is no substantial evidence that French would have been discharged in these circumstances even if he had not engaged in such union activity. Even Respondent's witnesses conceded that prior to April 17, French had not been reprimanded or otherwise disciplined for poor work. French was an experienced welder who had been performing structural welding at the Jacksonville job for several months. Denham told French that if French did not perform the tube welding properly Denham would bust French back to structural welding. Although there was plenty of structural welding available to which Denham could have assigned French, as he had said he was going to do, Denham chose instead to discharge French. I find that Denham seized on this opportunity to discharge French because of French's support for the Union, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

C. *The Reprimands Issued to Russell Myers and Respondent's Failure to Recall Myers from Layoff*

Russell Myers worked for Respondent from mid-December 1991 until early April 1992 without incident. In early April, Myers, who was not a member of the Union prior to going to work for Respondent, became a member of the Union's volunteer organizing committee. Soon after Myers became a member of that committee and began wearing a vest and other union emblems identifying him as such, Myers had several conversations with Supervisor Yarby Denham about the Union. In the first conversation, in early April, Denham commented to Myers that if he kept wearing the union insignia, Myers would not be welding on the boiler. In another similar conversation, Denham told Myers that if he did not take off his union insignia, Myers would not be welding on the boiler and would not be getting any overtime work. In this conversation Denham also told Myers that his ''days are numbered.'' In yet a third conversation, Denham told both Myers and employee Scott French that if they would take off their union insignia, Denham would see to it that they were taken off Respondent's ''hit list'' and get them working on the boiler where they would get a lot of overtime. Myers, however, continued to wear both the union insignia and the ''organizing committee'' vest. Myers continued in his attempts to organize employees.

On June 1, Boiler Superintendent Roger Reed approached Myers as Myers was taking a break. Reed told Myers that Myers needed to eat his breakfast at home. Myers responded that he was letting his welding machine cool off. Reed apparently failed to see the sarcasm in his own comment, but nevertheless viewed Myers' response as itself sarcastic. As Respondent admits, Myers' response angered Reed. Although Myers returned to work when Reed told him to do so, later that day Myers was issued a reprimand for ''sitting down eating a sandwich during work hours.'' This is the first reprimand Myers received on the job.

Myers testified without contradiction while there were no scheduled breaks other than lunchbreak employees customarily and regularly took a short morning break and a short afternoon break at or near their work area. Because Respondent does not even dispute this fact, there is little room for doubt about what motivated Reed to initiate this sarcastic confrontation with Myers. The only discernible difference between Myers and any number of other employees who took such breaks twice daily was the union vest and union insignia Myers was wearing. When Myers responded to Reed's sarcasm with equal force, it so angered Reed that even though Myers went back to work when told to do so, Reed nevertheless issued Myers a written reprimand.

Only 2 weeks later, Myers was issued a second reprimand under circumstances that begin to lend credence to Denham's warning about being on a hit list. Myers testified credibly, and Foreman Skobic admits, that Myers ran out of work and could not proceed further until he waited for a crew to build a scaffold. Myers testified credibly, and Skobic also admits, that Myers at least attempted to make good use of his waiting time by going to obtain additional welding rods. After the scaffold was built and Myers returned to work, Skobic brought Myers a written reprimand for unwise use of time. In spite of Myers' role as a union activist, and Supervisor Yarby Denham's warning that he was on Respondent's ''hit list'' as a result, Respondent argues that Foreman Skobic's

reprimand was not motivated by union animus, as proven primarily by the fact that Skobic was apparently an overzealous, recently appointed supervisor who issued numerous reprimands to numerous employees. The fact is, however, that even if Skobic issued numerous other reprimands that does not prove that the reprimand issued to Myers was not motivated by union animus. In fact, Respondent's admission that Skobic was overzealously attemping to prove himself a good supervisor leaves considerable room for the likelihood that at least part of Skobic's motivation for reprimanding Myers was Myers' open organizing efforts on behalf of the Union.

Only about a week after the second reprimand issued to Myers, Respondent laid off numerous employees, including Myers. Although Myers filed a new application for employment as he had been told to do, and although Myers checked back regularly with Respondent's personnel office, Respondent continued to tell Myers it had no work even after it began to call employees back from the layoff. In fact, the record shows that Respondent continued to tell Myers it had no work even after it hired new employees as welders. Respondent does not point to either of the two reprimands issued Myers as playing any part in its determination not to rehire Myers. Instead, when Foreman Yarby Denham was asked if he wanted Myers back to work, Denham simply made the decision not to rehire Myers.

The sole reason advanced by Denham for deciding not to rehire Myers was Denham's claim that Myers was somewhat of a slow welder. Denham claimed to have based this observation on informal records that he kept in a notebook but which were no longer available at the time of the trial here. I found Denham less than credible in this testimony. Moreover, I note that during the entire time Myers worked for Respondent from mid-December 1991 until he was laid off on June 22, Myers was never issued any type of discipline for low productivity. From observing Denham testify, I was left with little doubt that his testimony about Myers' productivity was pure fabrication in an attempt to obviate his real reason for not wanting Myers to return to work. I find that Denham's threats to Myers during April, its later reprimands to Myers, and its deliberate decision not to recall Myers from layoff with other employees were all motivated by Myers' open support for the Union and Myers' efforts as a member of the employee committee to organize fellow employees on behalf of the Union. I find that the threats to Myers violated Section 8(a)(1) of the Act and the reprimands and failure to recall Myers violated Section 8(a)(1) and (3) of the Act.

D. *Respondent's Rejection of Employment Applications*

As evidenced by the significant portions of their posttrial briefs devoted to this issue, it is apparent that the parties view Respondent's rejection of employment applications here as the focal point of this case. My own analysis of the facts here, and particularly existing case law, suggests to me that the issues presented here have largely been addressed and resolved by the Board and at least certain circuit courts, including cases involving these same parties. I am left with the distinct impression that all the parties involved here are posturing for this case to be considered in a circuit where perhaps the issues have not already been addressed. I say this only to point out that I am constrained by prior Board decisions and there is little, if anything, novel to be addressed here.

The facts are extremely simple. After union activity began to be engaged in openly at Respondent's Jacksonville jobsite 18 individuals who had applied for work with Respondent and whose applications identified themselves as ''volunteer union organizer'' or words to that effect, were notified by Respondent that their application for employment had been disqualified because the application had not been completed in accordance with instructions. Respondent maintains a policy in its field personnel procedures manual that ''grossly and obviously incomplete'' applications as well as applications containing ''non-responsive information'' should be disqualified.

Pursuant to Respondent's policy, numerous applications for employment are regularly disqualified, and counsel for the General Counsel conceded that it had no evidence that the policy had been applied disparately to single out only union adherents. On the other hand, evidence was introduced that at least 59 individuals hired at the Jacksonville project failed to provide a complete work history on their applications. In addition, certain individuals were hired who, while indicating they had a license to operate certain equipment, failed to note either the type or make of equipment they were qualified to operate.

As is clear from the parties' posttrial briefs, the issue is whether Respondent's ''extraneous information policy'' *as applied to applicants who write ''volunteer union organizer'' on their applications* is inherently destructive of Section 7 rights protected by the Act. If not, and interference with employee rights is comparatively slight, has an antiunion motive been shown as part of Respondent's reason for establishing or enforcing the rule to disqualify such applicants for employment. For the following reasons, I answer both questions in the affirmative, and I find that Respondent's policy violates Section 8(a)(1) and (3) of the Act.[5]

Counsel for the General Counsel and the Charging Party spend considerable portions of their posttrial briefs arguing that applicants for employment who write volunteer union organizer on their applications are engaged in concerted activity and/or union activity protected the Act. This is largely due to the fact that Respondent called as an expert witness Herbert R. Northrup, professor emeritus of management at the Wharton School of Business at the University of Pennsylvania. The essence of Northrup's testimony was that in his opinion applications of union members who write volunteer union organizer on their applications pursuant to the Union's Fight Back Program are not serious applicants for work and, presumably therefore, should not be considered as engaged in union activity protected by the Act. In Northrup's opinion,

[5] Throughout the trial counsel for the General Counsel argued its theory was that Respondent's rule constituted ''a *per se* violation'' of the Act. The Board, however, has consistently used that term to describe cases in which one looks only at the four corners of a rule in order to find within it something unlawful on its face. See *Our Way, Inc*., 268 NLRB 394 (1983), and cases discussed there. I note that in its posttrial brief counsel for the General Counsel does not mention any argument that Respondent's restrictive application policy constitutes a ''*per se* violation'' of the Act. Rather, it becomes clear from counsel for the General Counsel's posttrial brief that the real argument here is that Respondent's policy, and its application, is ''inherently destructive'' of Sec. 7 rights, as that term has been defined and applied in decisions of the Supreme Court, circuit courts, and the Board.

the purpose of the Fight Back Program is simply to inflict cost on the nonunion contractor, and possibly the customer as well. Respondent's argument that union members who apply for work and who write volunteer union organizer or words to that effect on their applications are not bona fide applicants has specifically been considered and rejected by the Board in a prior case involving these same parties. *Fluor Daniel, Inc*., 304 NLRB 790 (1991).[6]

While Respondent's argument has been specifically considered and rejected by the Board, and therefore need not be considered further, a brief analysis of Professor Northrup's testimony shows the fallacy of Respondent's position. Northrup based his ultimate conclusion, stated above, on the further observations/opinions that (1) applications are submitted too late in the project to effectively organize; (2) once hired, union applicants do not engage in significant organizing activity; (3) the Union admits in various publications that the program has had limited success; (4) the Union has not filed many representation petitions and has not, in fact, won many elections in the construction industry; and (5) the cost of maintaining an organizer is significant, so that, given these poor results, it makes no sense to continue unless there is some object other than organizing.

One of the more interesting facts is that Northrup's expert opinion is based solely on conversations and consultation with employers, particularly the Respondent, Brown & Root, and Zurn Nepco. Northrup conceded that he had never interviewed a single employee at any jobsite concerning the Union's ''Fight Back Program.'' Nor has Northrup spoken with any officer or other official of the Union regarding the program. Aside from the obvious potential bias in his expert opinion, Northrup also conceded that he had not done any study as to how much time ''volunteer organizers'' spend engaged in organizing activity once hired.

Finally, the single most important factor that Northrup found lacking if the Union was serious about organizing in its ''Fight Back Program'' was an expectation that he would see more ''salting'' by the Union. Northrup defined ''salting'' as people would go in, would lie low, and do organizing as much as they could. Northrup's expert opinion of the Union's ''Fight Back Program,'' the use of volunteer employee organizers, and the practice of applicants writing ''volunteer union organizer'' on their applications is thoroughly undermined by the facts in the instant case, for the Union began its organizing campaign at the Jacksonville jobsite by precisely such ''salting.'' Only after union members got hired by Respondent did they form a volunteer committee, identify themselves as such to Respondent, and begin organizing fellow employees. Only when that was done, and was beginning to show some success, did other union members then file applications for employment identifying themselves as volunteer union organizers. Using Northrup's own standards leaves little room for doubt that the Union was engaged in a serious organizing effort of Respondent's employees at the Jacksonville project. Significant ''salting'' occurred, followed by a substantial organizing effort by union members who had obtained jobs with Respondent. Those organizing efforts were at least particularly successful, as shown by the case of Russel Myers, who had not been a member of the Union before going to work for Respondent in Jacksonville. With regard to certain of Northrup's other observations, I would simply note that whether or not an organizing campaign is serious is not gaged by whether or not it is ultimately successful.

I find that union members who applied for work with Respondent and who wrote ''volunteer union organizer'' or words to that effect on their applications were engaged in union activity protected by the Act. It has long been recognized that applicants for employment are ''employees'' within the meaning of the Act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 61 (1941). Further, the display of union insignia has long been recognized as one of the fundamental rights protected by Section 7 of the Act. *Republic Aviation, Inc. v. NLRB*, 324 US. 793 (1945). See *Albertsons, Inc*., 300 NLRB 1013 (1990). It is also well settled that individuals engaged in union activity need not be acting in concert with other employees in order to be afforded protection of the Act. *Ohio Valley Graphics Arts, Inc*., 234 NLRB 493 (1978). As the Board recently noted in *Fluor Daniel, Inc*., 311 NLRB 498 (1993), an employee who writes ''volunteer organizer'' on his or her application explicitly places the employer on notice that he will try to exercise his statutorily protected right to organize his fellow employees. The placement of ''volunteer union organizer'' on applications is an act of self-identification, analagous to the display of union insignia, and represents the type of display of solidarity that Section 7 was designed to protect.

To the extent that Respondent has applied its extraneous information policy to disqualify applicants who exercise their Section 7 right by indicating on their applications that they are ''volunteer union organizers,'' Respondent's action is inherently destructive of such employee rights. *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26 (1967). Respondent is using the policy to uniformly weed out and disqualify any applicant for employment who is so bold as to acknowledge his union affiliation in advance. Both the Board and the courts have long recognized that certain conduct is so inherently discriminatory and destructive of Section 7 rights that proof of antiunion motive is unnecessary, and, in such cases, the employer ''must be held to intend the very consequences which foreseeably and inescapably flow from his actions.'' *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 228 (1963). In the instant case, applicants for work who were willing to identify themselves openly as union supporters automatically lost the opportunity for employment at Respondent's Jacksonville jobsite. Nothing could be more inherently destructive of Section 7 rights than automatically disqualifying union supporters from employment. As the Supreme Court specifically held in *Great Dane Trailers*, supra, in such cases ''no proof an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations.''

In *Erie Resistor*, the Supreme Court noted that an employer will typically defend against such charges by claiming that its actions were in pursuit of legitimate business ends, not destruction of employee rights. In response to that, the Court specifically stated:

> Nevertheless, [the employer's] conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding jus-

[6] Fluor Daniel, Inc. is the parent company of Respondent Zachry.

> tification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. [373 U.S. at 228.]

In *Great Dane Trailers*, the Supreme Court expounded on this point, stating:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was ''inherently destructive'' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is ''comparatively slight,'' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him. [388 U.S. at 34.]

Thus, only if the adverse affect on employee rights is comparatively slight does the employer's business justification or its antiunion motivation become relevant. As indicated, I find that Respondent's policy, as applied to applicants who identified themselves as ''volunteer union organizers'' is inherently destructive of important employee rights that protect employees and give them the right to freely and openly identify themselves as union supporters. Accordingly, neither Respondent's business justification nor antiunion motivation is relevant. Nevertheless, I consider Respondent's proffered business justification because I would find Respondent's conduct to be unlawful even if its adverse affect on employee rights was ''comparatively slight.''

The real business justification for Respondent applying its extraneous information policy to applicants who write ''volunteer union organizer'' on their applications is found in two combined passages in Respondent's posttrial brief. In a footnote in its posttrial brief, Respondent explains:

> An employer in the possession of unrequested knowledge that an applicant is a volunteer union organizer is unwittingly placed in a catch 22 situation. In that context, the employer either give the applicant a preference, hiring the individual (and avoiding NLRB litigation) while discriminating against those who do not provide such a statement. Alternatively, he can consider the applicant in a non-discriminatory fashion, chancing that the applicant will not be hired, and thus, that he will be called on to defend an expensive and protracted NLRB case, win or lose. Either alternative is simply unacceptable.

Elsewhere in its posttrial brief, Respondent expounds:

> The logic behind this rule lies in the basic undisputed fact that on each and every construction job, Zachry receives far more applications than it has openings. . . . If people are allowed to write non-legitimate information (such as I am disabled, or I am African American or I am a union organizer), information which Zachry cannot and would not consider in making hiring decisions, then the *defense process* is much more difficult. [Emphasis added.]

In short, Respondent's sole business justification for applying its extraneous information policy to applicants who note themselves to be ''volunteer union organizers'' is to construct a defense in litigation. Its admitted purpose is to enhance its ''defense process.'' It is not, as Respondent claims it is, to prevent supervisors from discriminating against union members, for in the construction industry the work experience of an applicant with a series of either organized employers or nonunion employers will tend to suggest the applicant's union membership. This is the very point on which the Board based its decision in *Fluor Daniel, Inc*., 304 NLRB 970 (1991), involving this same Respondent. In short, the whole purpose underlying the policy is to remove the ability of applicants to attempt to protect themselves by being able to prove without any doubt that Respondent had knowledge of their prounion sentiments. Thus, Respondent's business justification amounts to no more than legal posturing. By any measure, such legal posturing is not the ''substantial business justification'' which the Supreme Court envisioned might be allowed to adversely affect employee rights under the Act, even where that effect is ''comparatively slight.''

As can be seen from the Supreme Court's decision in *Great Dane Trailers*, the issue of antiunion motivation and the issue of business justification in any given case are not necessarily coextensive. This is apparent since the Supreme Court noted that where the adverse affect of discriminatory conduct is comparatively slight, an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Hence, it is apparent that even where there are legitimate and substantial business justifications evidence of antiunion motivation may quite possibly exist so as to render the conduct unlawful. On the other hand, the issue of antiunion motivation and the issue of business justification are to a large extent related since the Court noted that once it has been proven employer conduct adversely affects employee rights to some extent, the burden is on the employer to establish that he was ''motivated by legitimate business objectives since proof of motivation is most accessible to him.'' As the decision has been applied in the vast myriad of cases since *Great Dane Trailer*, the issues antiunion motivation and business justification have tended to overlap. Nevertheless, the difference between those two issues has sometimes been significant. See, e.g., *Frigid Storage, Inc*., 294 NLRB 660 (1989).

The parties offered considerable evidence on the issue of Respondent's motive for establishing the extraneous information policy. Counsel for the General Counsel introduced a position statement written by Respondent's counsel and addressed to the Board's Regional Office during the investigation of this case that tends to show that Respondent established the extraneous information policy in large part in response to union activity. In this position statement, Respondent's counsel stated:

> Clearly, this is a union blackmail tactic through which they tell an employer, hire this applicant (who put voluntarily union organizer on his application) or we will ''sue you.'' *In an attempt to deal with this policy of blackmail, Zachry simply adopted the neutral policy on extraneous information.* Zachry is more than willing to give these applicants equal consideration, but should not be blackmailed into giving them ''super consideration.'' [Emphasis added.]

Counsel states in no uncertain terms that Respondent adopted the extraneous information policy in an attempt to deal with this policy of blackmail. Through its witnesses at trial here, and in Respondent's posttrial brief, Respondent's counsel spends considerable time and effort disavowing its own statement and offering instead purely neutral considerations for establishing the policy. Respondent called Vice President of Employee Relations Stephen Hoech who testified that he developed the policy for the following reasons:

> [T]o meet the requirements of the various government agencies such as retaining records regarding race and sex of applicants, and yet still keep that away from the people making decisions so that we were not in a position of having to defend ourselves in that we used that information for it somehow was used in the employment decisions. We were able to take that and develop from that . . . the tear sheet on statistical information.
>
> The idea was that clerical people and employment people could, through instructions, separate that information at the time of record keeping requirements, and then yet latter make decisions based on the application that was free of that information. Kind of keep that out of sight, out of mind from the people making the ultimate hiring decisions.

It is apparent, though, from Hoech's further testimony that Respondent's counsel was not all wrong in the statement he made to the Board's Regional Office. Hoech's testimony continues:

> Q. [By Respondent's counsel] Were you aware at the time [that the policy was developed] that certain of the Building Trade Unions had developed programs, of writing the statement ''volunteer union organizer'' and other ways of indicating, well, let me just say ''volunteer union organizer'' on their applications when applying for work at non-union companies? Were you aware that that was going on at that time?
>
> A. [By Hoech] Yes, along with other groups writing things on there for their particular advantage. Black employees looking for preferential treatment with regards to hiring, people from the anti-nuclear industry when we were working on nuclear power plants with my previous company, that sought of stuff. So yes.
>
> Q. Was that part of your discussions in development of this manual?
>
> A. Yes, it was.

In fact, counsel's statement to the Regional Office and Hoech's testimony tend to corroborate one another, and I find on the basis of them that Respondent's motive for establishing the extraneous information policy was indeed ''in an attempt to deal with'' the Union's practice of encouraging its members to apply for work designating themselves as ''volunteer union organizers.'' Hence, Respondent's business justification as well as its motive for establishing the extraneous information policy was solely to construct a legal defense as already discussed.

Respondent argues that the applications of four of the people who were disqualified for writing ''volunteer union organizer'' or words to that effect on their applications would have been disqualified for another, lawful reason, even if they had not been disqualified pursuant to the extraneous information policy. Respondent argues that these four individuals would have been disqualified pursuant to the ''incompleteness policy'' also found in Respondent's field personnel procedures manual. Respondent in effect asserts a ''*Wright Line* defense'' that even if these individuals had not had their applications rejected for a reason related to union activity, they would nevertheless have been disqualified for other reasons. The evidence which Respondent adduced in support of this defense tends to strengthen the General Counsel's case rather than weaken it, because it shows the extreme to which Respondent has gone in order to disqualify certain individuals while hiring others.

Respondent's field personnel procedures manual states that ''grossly and obviously incomplete'' applications are to be disqualified. Be that as it may, Field Personnel Manager Evans testified that alleged discriminatee Samuel Lindsey's application would have been disqualified even if it had not said ''volunteer union organizer'' because the application was not dated and did not indicate how long Lindsey had worked for another employer in the fall of 1991. Evans testified that alleged discriminatee Jess Hodges would have been disqualified in any event because Hodges did not list a reason for leaving one of his past employers and because the application did not contain certain dates in the block in which Hodges indicated he worked for the Union. Evans testified that Ronald Ford would have been disqualified in any event because he failed to list the months during which he indicated he worked for the Union. Evans testified that alleged discriminatee David Hargrove would have been disqualified in any event because his application contained additional unnecessary information in addition to the statement that he was a ''volunteer union organizers.'' Evans testified that the additional unnecessary and disqualifying information on Hargrove's application was the statement, ''A complete list of all jobs and dates will be given to you at your request.''

First, I must observe that Evans' claims that these four individuals would have been disqualified in any event is extremely suspect. For example, Evans, who personally disqualified Hodges' application failed to note in the ''Interviewers' Comments'' that Hodges was disqualified because he failed to list a reason for leaving one employer. Evans' reasons state only ''incomplete date and unnecessary info.'' The blank ''Reasons For Leaving'' block on Hodges' application was obviously an afterthought by Evans sometime between the actual disqualification and Evans' testimony. Nevertheless, taking Evans' testimony at face value tends only to show the extreme to which Respondent reached in order to disqualify certain applications.

Although the record reflects that Respondent indeed disqualified many applications without dates on them, it is clear

that Respondent's practice was far from uniform or consistent. The record is replete with examples of applications of employees hired by Respondent that are incomplete in numerous ways, as well as examples of applications of employees hired with specific dates missing from the prior employment section of their applications.

Evans testified that omission of a single item would be sufficient grounds to disqualify an application. In fact, Evans went so far as to testify that the ''only thing'' which would not disqualify an application for incompleteness would be not putting a supervisor's name in the prior history section or ''somewhat complete information'' in the educational section. One cannot help but juxtapose Evans' testimony to the field personnel procedures manual that makes no mention of disqualifying an application for leaving off a date. Not only does the manual state that ''grossly and obviously incomplete'' applications are the ones to be disqualified, the manual provides a relatively detailed explanation by way of questions and answers of the grounds for which applications should be disqualified. Regarding the past employment section of the application, the manual poses this question: Is the work experience recent enough to indicate the applicant is proficient in the type of work sought? There is no mention of some strictly enforced rule that each and every month of past employment must be accounted for on the application. Yet, that is how Evans would, and did, apply the rule, at least as to certain applicants.

Rather than showing that Lindsey, Hodges, Ford, and Hargrove would have been disqualified in any event pursuant to a nondiscriminatory objective rule even if they had not placed ''volunteer union organizer'' on their application, Evans' testimony offers a revealing picture of a complicated game Respondent has developed to justify the rejection of practically any application it chooses. These rules are applied to some applications and not others. This evidence tends to support and indeed strengthen the conclusion that the complicated hiring rules were designed to weed out certain applicants while at the same time constructing a defense that Respondent had no knowledge of that applicant's union sentiments. In short, what Respondent had developed on paper to appear to be an objective hiring procedure is in reality a sham, a game with rules so complicated and strict that Respondent can hire or weed out anyone it chooses. I find that Respondent failed and refused to hire the named alleged discriminatees because they identified themselves as volunteer union organizer or words to that effect and because of their union affiliation in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent H. B. Zachry Company is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not articulate an unlawful prohibition on all jobsite distribution of union literature, and that allegation is dismissed.

4. Counsel for the General Counsel has failed to prove that protected conduct was a motivating factor in the discharge of Mathew Jonjock, and that allegation is dismissed.

5. Respondent threatened employee Scott French and other employees with physical violence because they organized on behalf of, or supported, the Union, and Respondent thereby violated Section 8(a)(1) of the Act.

6. Respondent threatened employee Scott French that French was on Respondent's ''hit list'' and offered French overtime work to try to get French to cease union organizing activity, and Respondent thereby violated Section 8(a)(1) of the Act.

7. Respondent discharged Scott French because of French's activities on behalf of, or support for, the Union and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

8. Respondent threatened Russell Myers that if Myers did not take off union insignia, Myers was not going to get welding work on the boiler and was not going to get overtime; threatened Myers that his ''days are numbered''; told Myers along with employee Scott French that French, Myers, or both were on Respondent's ''hit list'' and offered overtime work to try to get them to cease union organizing activity, and Respondent thereby violated Section 8(a)(1) of the Act.

9. Respondent issued written reprimands to Russell Myers and failed to recall Myers from layoff because of Myers' activities on behalf of, or support for, the Union, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

10. Respondent failed and refused to hire applicants who identified themselves as ''volunteer union organizers'' or words to that effect on their applications, and because of their union affiliation, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

11. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act.

[Recommended Order omitted from publication.]